Before the FEDERAL COMMUNICATIONS COMMISSION Washington, D.C. 20554

DIRECTV, LLC AND AT&T SERVICES, INC.,

Complainants,

v.

DEERFIELD MEDIA, INC., DEERFIELD MEDIA (PORT ARTHUR) LICENSEE, LLC, DEERFIELD MEDIA (CINCINNATI) LICENSEE, LLC, DEERFIELD MEDIA (MOBILE) LICENSEE, LLC, DEERFIELD MEDIA (ROCHESTER) LICENSEE, LLC, DEERFIELD MEDIA (SAN ANTONIO) LICENSEE, LLC, GOCOM MEDIA OF ILLINOIS, LLC, HOWARD STIRK HOLDINGS, LLC, HSH FLINT (WEYI) LICENSEE, LLC, HSH MYRTLE BEACH (WWMB) LICENSEE, LLC, MERCURY BROADCASTING COMPANY, INC., MPS Media of Tennessee Licensee, LLC, MPS Media of Gainesville Licensee, LLC, MPS MEDIA OF TALLAHASSEE LICENSEE, LLC, MPS MEDIA OF SCRANTON LICENSEE, LLC, NASHVILLE LICENSE HOLDINGS, LLC, KMTR TELEVISION, LLC, SECOND GENERATION OF IOWA, LTD, AND WAITT BROADCASTING, INC.,

MB Docket No. 19-168 CSR-8979-C

Defendants.

REPLY IN SUPPORT OF DIRECTV, LLC AND AT&T SERVICES, INC.'S COMPLAINT FOR DEFENDANTS' FAILURE TO NEGOTIATE IN GOOD FAITH

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August 23, 2019

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DIRECTV, LLC ("DIRECTV") and AT&T Services, Inc. ("U-verse," and with DIRECTV, "AT&T"), pursuant to 47 C.F.R. § 76.7(c), hereby reply to the August 6, 2019

Answer of the above-captioned defendants ("Defendants" or the "Station Groups") to AT&T's good-faith Complaint.¹

SUMMARY

Defendants seek to characterize this case as a dispute about the ability of nine small, isolated broadcast station groups [BEGIN CONFIDENTIAL] [END]

CONFIDENTIAL] against AT&T. No aspect of that characterization is correct. As an initial matter, these purportedly independent entities are in fact managed and controlled by Sinclair Broadcast Group ("Sinclair"), one of the nation's largest broadcasters, and the retransmission consent fees they are seeking to extract [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL] — at consumer expense.

Even more to the point, contrary to Defendants' assertions, AT&T's legal claim is not that the Station Groups [BEGIN CONFIDENTIAL] [END]

CONFIDENTIAL] It is that they each refused to negotiate for carriage of their stations,

[BEGIN CONFIDENTIAL] [END CONFIDENTIAL] at any point before their existing retransmission consent agreements expired. The Station Groups used a [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] as a go-between with AT&T, [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] did not actually negotiate for these parties, did not respond at a reasonable time, and in fact was used to [BEGIN CONFIDENTIAL]

¹ AT&T's request to extend the due date for this reply to August 23, 2019, was granted by email from Mr. Lyle Elder to counsel for the parties on August 9, 2019.

IEND

CONFIDENTIAL] to provide Defendants an unfair advantage.

The Station Groups' claim that the Commission has sanctioned these tactics rests on the deeply flawed premise that anything station groups do [BEGIN CONFIDENTIAL]

[END CONFIDENTIAL] – even refusing to

negotiate [BEGIN CONFIDENTIAL]

END

END

CONFIDENTIAL] – is permissible. The Commission has said no such thing. The Commission's good-faith negotiation rules and orders apply with equal force to broadcasters claiming to [BEGIN CONFIDENTIAL]

[END CONFIDENTIAL] A contrary rule would create an unintended bad-faith safe harbor for the Station Groups and others relying on [BEGIN CONFIDENTIAL]

[END CONFIDENTIAL] to avoid the requirements to negotiate in good faith, leading inevitably to consumer harm.

At the end of the day, the relevant Commission *per se* rules are clear and undisputed.

Broadcasters are not allowed (i) to refuse to negotiate or respond to proposals² or (ii) to refuse to negotiate at reasonable times or to unreasonably delay.³ Nor is there any reasonable dispute that

CONFIDENTIAL] is a separate failure to bargain in good faith under the totality-of-the-circumstances test.⁴ The Station Groups have done all of these things, and they do not even seriously dispute the core facts establishing as much.

[BEGIN CONFIDENTIAL]

⁴ See id. § 76.65(b)(2); [BEGIN CONFIDENTIAL]

² See 47 C.F.R. § 76.65(b)(1)(i), (v).

³ See id. § 76.65(b)(1)(iii).

The facts show that the Station Groups refused to discuss so much as a single term in
their own agreements until after nearly all their stations had gone dark. In this regard, the Station
Groups do not dispute that AT&T made multiple proposals to each of them and that they never
responded to those proposals. They also do not dispute their failure to propose any alternative
terms of their own for retransmission of their stations. Defendants claim (at 18-19) that [BEGIN
CONFIDENTIAL] [END CONFIDENTIAL]
concerning carriage of "Defendants' stations," but they cannot point to any pre-blackout
proposal that includes any of their stations.
The undisputed facts thus do not show [BEGIN CONFIDENTIAL]
[END CONFIDENTIAL] Rather, they show a failure to negotiate. Only
[BEGIN CONFIDENTIAL] [END CONFIDENTIAL] AT&T were
negotiating (despite AT&T's attempts to negotiate with Defendants), which explains why
[BEGIN HIGHLY CONFIDENTIAL]
[END HIGHLY CONFIDENTIAL] but Defendants still do not. [BEGIN
HIGHLY CONFIDENTIAL]
[END HIGHLY CONFIDENTIAL] The Station Groups thus violated

[END CONFIDENTIAL] see also Memorandum Opinion and Order, Ryder Commc'ns, Inc. v. AT&T Corp., 18 FCC Rcd 13603, ¶ 28 (2003) (recognizing "the strong public interest in preserving the sanctity of contracts").

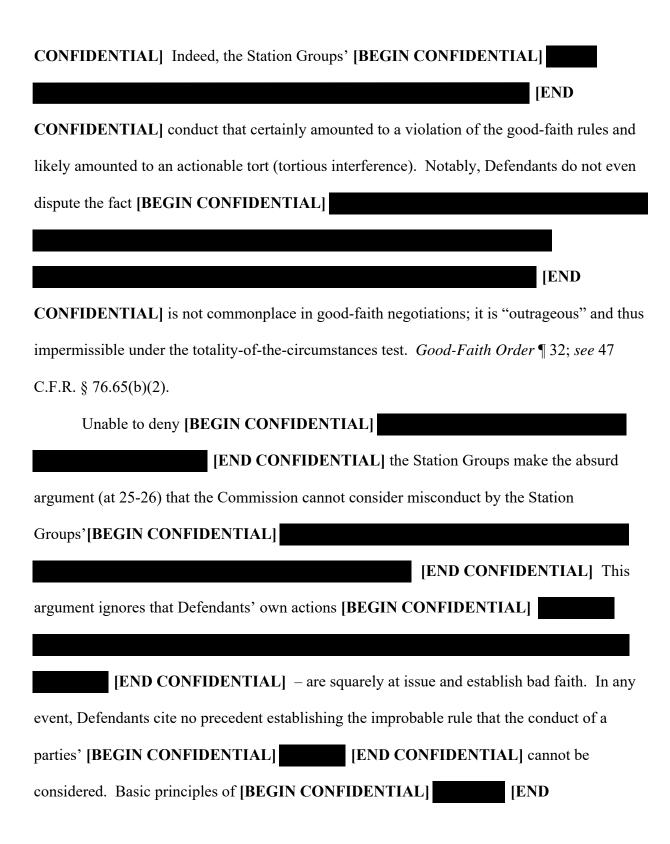
the per se rules against refusing to negotiate and failing to respond to proposals from the other party. See 47 C.F.R. § 76.65(b)(1)(i), (v).

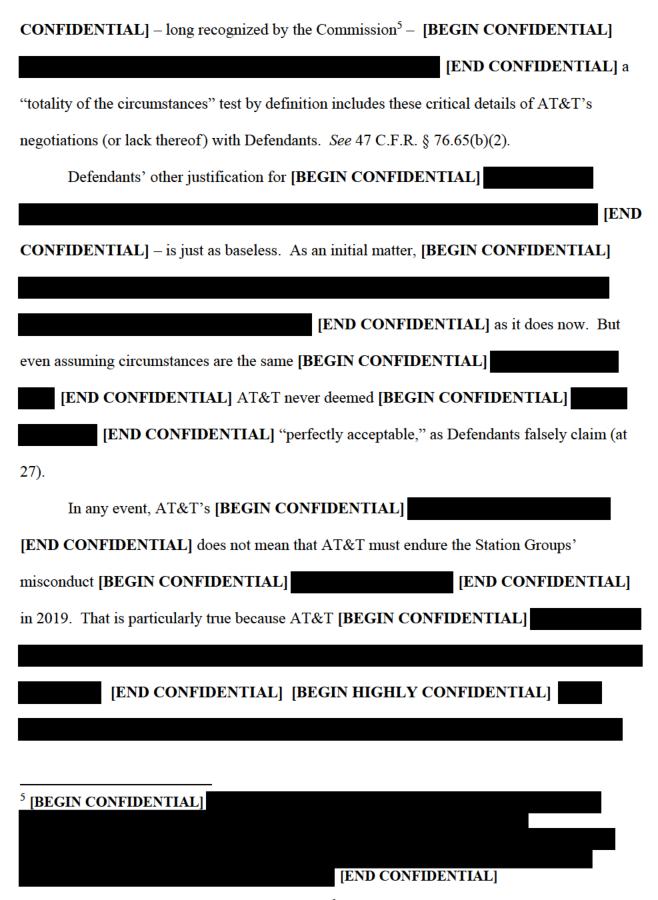
The facts likewise show that the Station Groups refused to negotiate "at reasonable times" and acted "in a manner that unreasonably delay[ed]" negotiations. Id. § 76.65(b)(1)(iii). In assessing reasonableness, the Commission considers "the proximity of the termination of retransmission consent and the consequent service disruptions to consumers." First Report and Order, Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission *Consent Issues: Good Faith Negotiation and Exclusivity*, 15 FCC Rcd 5445, ¶ 42 (2000) ("Good-Faith Order"). Despite AT&T [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] Defendants guaranteed there would be disruptions by refusing to discuss carriage of *their* [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] at any point before they went dark, [BEGIN **CONFIDENTIAL** [END CONFIDENTIAL] Again, the Answer does not dispute the key

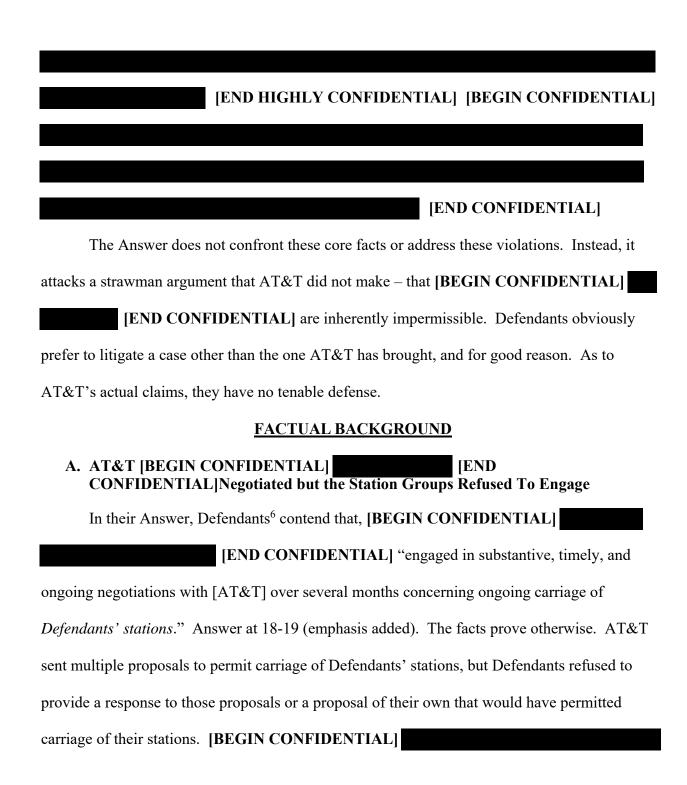
facts underlying these allegations, which establish Defendants' liability.

In addition to these *per se* violations, the Station Groups have acted in bad faith under the totality of the circumstances. Defendants casually dismiss (at 24) AT&T's concerns as "commonplace disagreements" over "substantive terms." That obviously is not – and could not be – AT&T's concern, because Defendants never put forth terms in the first place. As AT&T alleged, its concern is that, despite AT&T's vigorous [BEGIN CONFIDENTIAL]

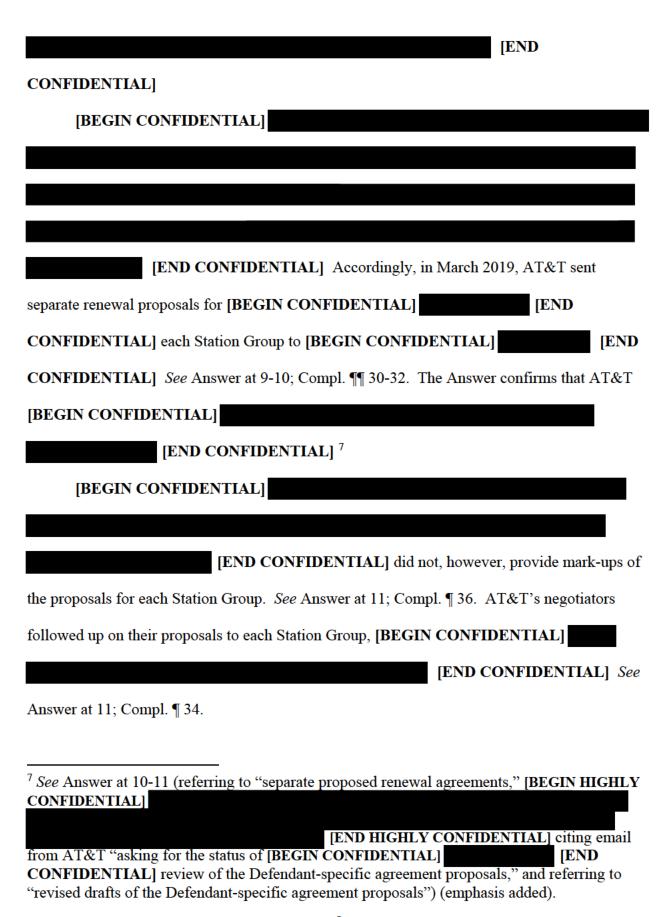
[END CONFIDENTIAL] the Station Groups [BEGIN **CONFIDENTIAL**



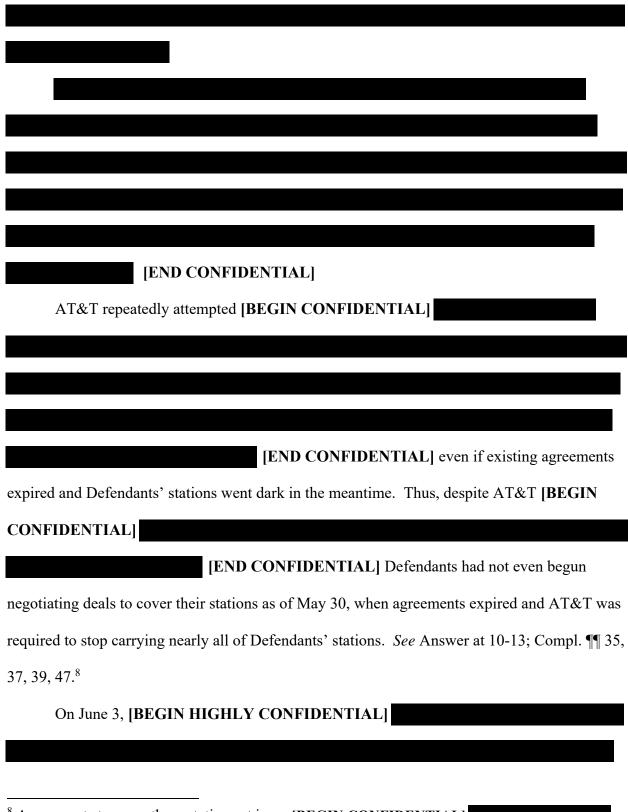




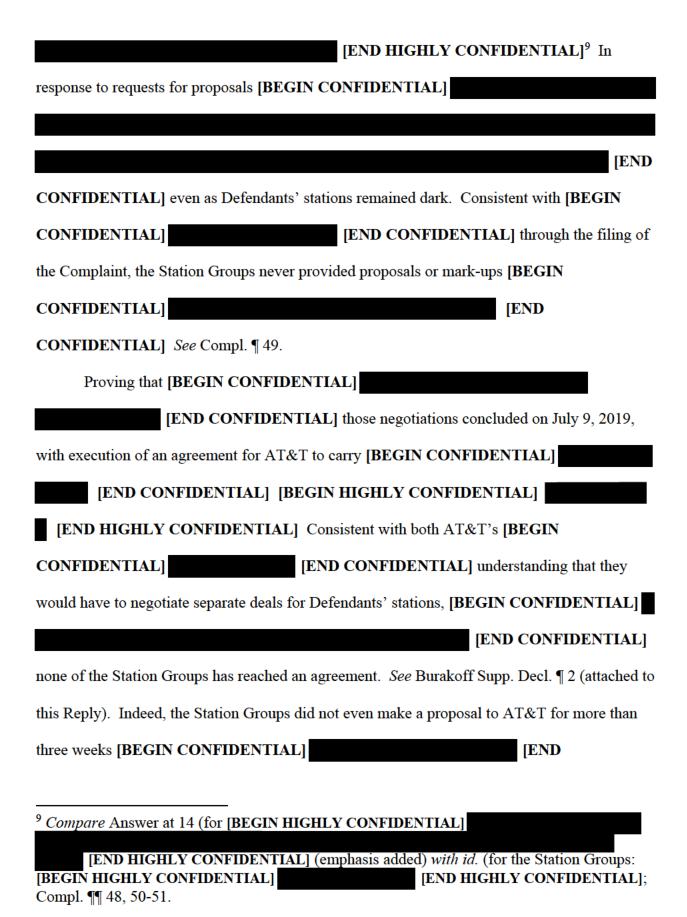
⁶ Defendants assert that Deerfield Media, Inc. is not properly named because it does not "own or control any broadcast stations or licenses" for the Deerfield stations at issue. Answer at 31, ¶ 14. The Deerfield stations' websites state, however, that they are "owned and operated by Deerfield Media, Inc.," Compl. ¶ 14 & nn.15-19, and AT&T named Deerfield Media, Inc. to ensure notice, see id. n.20.

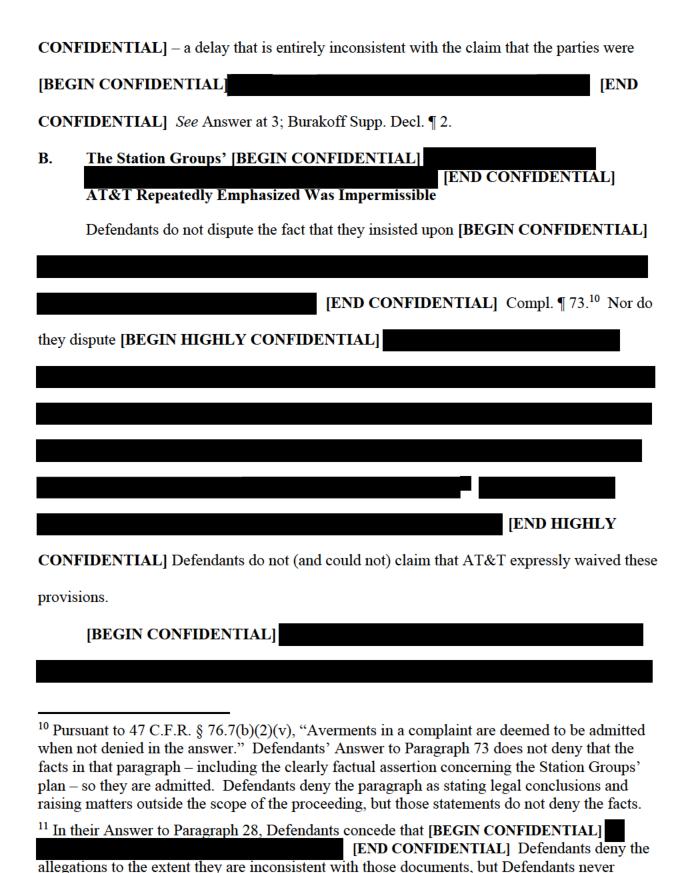


On April 19, 2019, AT&T sent [BEGIN CONFIDENTIAL] [END
CONFIDENTIAL] revised proposals for [BEGIN CONFIDENTIAL] [END
CONFIDENTIAL] each of the Station Groups. See Answer at 11; Compl. ¶ 37. Again,
[BEGIN CONFIDENTIAL] [END CONFIDENTIAL] sent AT&T [BEGIN
CONFIDENTIAL] [END
CONFIDENTIAL] but did not mark-up or respond to proposals for each Station Group.
Answer at 11 (emphasis added); see Compl. ¶ 38. [BEGIN CONFIDENTIAL]
[END CONFIDENTIAL] [BEGIN HIGHLY
CONFIDENTIAL
[END HIGHLY CONFIDENTIAL] [BEGIN CONFIDENTIAL]
[END CONFIDENTIAL]
[BEGIN CONFIDENTIAL]



⁸ Agreements to carry three stations at issue [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] and AT&T was forced to stop transmitting their signals, as well. See Answer at 13; Compl. ¶ 47.





explain why AT&T's reading of those agreements is incorrect.

	TEND
	[END
ONFIDENTIAL]	
Before beginning the most recent round of negotia	ations, by contrast, [BEGIN HIGHL
ONFIDENTIAL]	
	[EN
IGHLY CONFIDENTIAL] [BEGIN CONFIDENTI	[AL]
[END CONFIDENTIAL] ¹² AT&T also re	eiterated this point later in February.
efore sending any proposals [BEGIN CONFIDENTIA]	L]
[END CONFIDENTIAL] and on numerous of	ther subsequent occasions. [BEGIN]
ONFIDENTIAL]	
[BEGIN CONFIDENTIAL]	
DEGIN CONFIDENTIAL	
	CONFIDENTIAL
IEND	CONFIDENTIAL

[END CONFIDENTIAL] [BEGIN HIGHLY CONFIDENTIAL]
[END HIGHLY CONFIDENTIAL] [BEGIN
CONFIDENTIAL] [END
CONFIDENTIAL]
AT&T also routinely included the following notice [BEGIN HIGHLY
CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]
[BEGIN CONFIDENTIAL]
[END CONFIDENTIAL] [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL] [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] [END CONFIDENTIAL] [END CONFIDENTIAL] [END CONFIDENTIAL]
This course of conduct made clear that, when AT&T was negotiating [BEGIN
CONFIDENTIAL]
[END
CONFIDENTIAL]
Notably, this message was included in, among other things, [BEGIN HIGHLY
CONFIDENTIAL]
13 [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL] ¹⁴ Thus, contrary to Defendants'
assertion (at 10, 11, 12) that AT&T [BEGIN CONFIDENTIAL]
[END CONFIDENTIAL] in fact, [BEGIN
CONFIDENTIAL]
[END CONFIDENTIAL]
Despite these clear and consistent warnings, the Station Groups persisted in [BEGIN
CONFIDENTIAL]
[END CONFIDENTIAL] Compl. ¶ 69. Critically, Defendants
do not deny the fact that [BEGIN CONFIDENTIAL]
[END CONFIDENTIAL] [BEGIN HIGHLY CONFIDENTIAL]
[END HIGHLY CONFIDENTIAL] See id. ¶¶ 51, 69. 15
<u>ARGUMENT</u>
Broadcast stations are required to "negotiate in good faith the terms and conditions of
retransmission consent agreements" with distributors. 47 C.F.R. § 76.65(a). The Commission
has established a list of actions that violate this duty per se. See id. § 76.65(b)(1). The
Commission can also find a breach of the duty "based on the totality of the circumstances of a

[END HIGHLY

CONFIDENTIAL]

justiciable here. See Answer at 25-27, 44.

^{14 [}BEGIN HIGHLY CONFIDENTIAL]

Defendants' Answers to Paragraphs 51 and 69 do not deny anything on factual grounds, and thus the facts in those paragraphs should be deemed admitted. See 47 C.F.R. § 76.7(b)(2)(v). Defendants' Argument also does not dispute that [BEGIN CONFIDENTIAL]

[END CONFIDENTIAL] and instead contends that [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] is either permissible or non-

particular retransmission consent negotiation." *Id.* § 76.65(b)(2). AT&T alleged – and the undisputed facts prove – that Defendants violated their duty under both standards.

- I. THE STATION GROUPS COMMITTED MULTIPLE PER SE VIOLATIONS BY REFUSING TO NEGOTIATE THEIR OWN DEALS AT ANY POINT BEFORE THE COMPLAINT WAS FILED
 - A. The Station Groups Refused To Negotiate Their Own Deals or Respond to Proposals To Permit Retransmission of Their Stations

The Commission's most fundamental *per se* rule precludes a broadcaster from refusing to negotiate. *See* 47 C.F.R. § 76.65(b)(1)(i). A related rule requires broadcasters "to respond to a retransmission consent proposal of the other party, including the reasons for the rejection of any such proposal." *Id.* § 76.65(b)(1)(v). These rules thus require broadcasters "affirmative participation" with "the intent of reaching agreement." *Good-Faith Order* ¶¶ 40, 44.

The Station Groups have violated these rules. AT&T sent separate proposed agreements to each of the Defendants in March. Between March and the filing of this Complaint, however, the Station Groups never responded to those proposals and never provided proposals of their own to permit carriage of their stations. Indeed, they never proposed a single term concerning carriage of nearly all their stations before they went dark in May. By refusing to present AT&T with terms that would allow it to carry their stations – either by responding to AT&T's proposals or by providing proposals of their own – Defendants refused to negotiate and refused to respond to AT&T's proposals in violation of § 76.65(b)(1)(i) and (b)(1)(v).

Defendants claim that they were engaged in "ongoing negotiations with Complainants over several months concerning ongoing carriage of *Defendants*' stations." Answer at 18-19 (emphasis added). That is demonstrably false. As described above and in the Complaint, the only drafts exchanged during those months of negotiations (other than the Station Group-specific proposals AT&T sent and Defendants ignored) were, on their face, [BEGIN CONFIDENTIAL]

[END CONFIDENTIAL] Defendants do not dispute that [BEGIN
CONFIDENTIAL] [END CONFIDENTIAL] was the only station group listed as
a party or that [BEGIN CONFIDENTIAL] [END CONFIDENTIAL]
were the only ones included in the deals. ¹⁶ By its terms, [BEGIN CONFIDENTIAL]
[END CONFIDENTIAL] would not have resulted in "carriage of
Defendants' stations" because [BEGIN CONFIDENTIAL]
[END CONFIDENTIAL] Indeed, when the parties did reach agreement [BEGIN
CONFIDENTIAL] [END CONFIDENTIAL] Defendants' stations remained
dark.
Defendants' [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] also
acknowledged that [BEGIN CONFIDENTIAL] [END
CONFIDENTIAL] was never intended to apply to Defendants or their stations. He
acknowledged that AT&T would need to negotiate [BEGIN CONFIDENTIAL]
[END CONFIDENTIAL]
Permitting broadcasters to use the mere assertion of a [BEGIN CONFIDENTIAL]
[END CONFIDENTIAL] to defer negotiations until an uncertain future event
16 [BEGIN CONFIDENTIAL]
[END CONFIDENTIAL] The documents also speak for themselves. [BEGIN
HIGHLY CONFIDENTIAL] The documents also speak for themselves. [BEGIN]
[END HIGHLY CONFIDENTIAL]

would gut the Commission's rules and enable broadcasters to avoid negotiating when they believed that suited their interests. Thus, the fact that Defendants did not have a present "intent of reaching agreement" at any time prior to execution of [BEGIN CONFIDENTIAL]

[END CONFIDENTIAL] gives rise to a per se violation. Good-Faith Order

¶ 40.17

B. The Station Groups Refused To Negotiate at Reasonable Times

Even if the Defendants' actions are not construed as an outright refusal to negotiate or failure to respond, they establish a *per se* violation because broadcasters must negotiate "at reasonable times" and cannot act "in a manner that unreasonably delays retransmission consent negotiations." 47 C.F.R. § 76.65(b)(1)(iii). This rule requires responses "on a timeline that is reasonable in the specific context of the negotiations at hand." Memorandum Opinion and Order, *Coastal Television Broad. Co. v. MTA Commc'ns, LLC*, 33 FCC Rcd 11025, ¶ 8 (Chief, Media Bur. 2018) ("*Coastal Television*"). The Commission further recognized that, "in many cases, time will be of the essence in retransmission consent negotiations," and advised that "we will consider the proximity of the termination of retransmission consent and the consequent service disruptions to consumers." *Good-Faith Order* ¶ 42.

Even setting aside whether a broadcaster is *ever* permitted to delay negotiations for months after receiving a proposal, the Station Groups' delay here – **[BEGIN**

¹⁷ Defendants cite (at 23 n.98) Memorandum Opinion and Order, *HITV License Subsidiary, Inc. v. DIRECTV, LLC*, 33 FCC Rcd 1137 (Chief, Media Bur. 2018), but that case supports AT&T's position. The Commission rejected a refusal to negotiate claim because *Defendant* had already provided a proposal, and it was not obligated to provide another absent a response. The Station Groups here do not have that defense because they never provided a proposal for their stations before AT&T filed the Complaint. Moreover, the Commission recognized that "DIRECTV... is not obligated to negotiate against itself," *id.* ¶ 8, yet by refusing to respond to AT&T's proposals, that is exactly what the Station Groups are requiring AT&T to do here.

extending long into a blackout – is patently unreasonable given the certainty and severity of service disruptions resulting from the Station Groups' delay. It is revealing that Defendants never explain how their strategy could have resulted in the parties reaching new agreements before May 30, when existing agreements expired. For this reason alone, Defendants' actions

are an unreasonable delay under the Commission's rules.

Beyond that, [BEGIN CONFIDENTIAL]

LEND

CONFIDENTIAL] – a future event that not only lacks a set date, but may never actually occur, as evidenced by the fact that many of **[BEGIN CONFIDENTIAL]**

[END CONFIDENTIAL] proved willing to take their stations dark – is a refusal to negotiate at reasonable times. Defendants did not act as if time was of the essence to reaching a deal, but rather as if time was immaterial. For that reason as well, the Station Groups' unreasonable delay establishes another *per se* violation.

II. THE STATION GROUPS DO NOT DISPUTE THAT THEY [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] ESTABLISHING BAD FAITH UNDER THE TOTALITY OF THE CIRCUMSTANCES

Even if the foregoing misconduct does not give rise to any *per se* violation, the Commission should find that the Station Groups violated their duty to negotiate in good faith "based on the totality of the circumstances." 47 C.F.R. § 76.65(b)(2). A party fails this test if its

¹⁸ Defendants cite (at 23 n.98) *Coastal Television*, but the Commission in that case found no unreasonable delay because the defendant "with[e]ld making *another* counter-offer in the absence of a reply . . . to [its] reasonable inquiries." *Coastal Television* ¶ 8 (emphasis added). The Station Groups failed to make a first counteroffer on their deals (let alone "another" one), and they do not claim that their delay is excused by AT&T's failure to respond to some reasonable inquiry.

conduct "reflect[s] an absence of a sincere desire to reach an agreement that is acceptable to both parties" or is "sufficiently outrageous." *Good-Faith Order* ¶ 32.

A. Defendants' [BEGIN CONFIDENTIAL] [END CONFIDENTIAL]

Defendants' entire strategy was premised on "outrageous" conduct. They do not dispute that their plan [BEGIN CONFIDENTIAL]

[END CONFIDENTIAL] See supra note 15; 47 C.F.R. § 76.7(b)(2)(v) (averments admitted if not denied). [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL] [BEGIN CONFIDENTIAL]

[END CONFIDENTIAL]

Defendants' undisputed conduct runs afoul of Commission precedent, and therefore establishes bad faith under the totality-of-the-circumstances test. First, the Commission has explicitly recognized "the strong public interest in preserving the sanctity of contract."

Memorandum Opinion and Order, *Ryder Commc'ns, Inc. v. AT&T Corp.*, 18 FCC Rcd 13603,

19 [BEGIN CONFIDENTIAL]

[END CONFIDENTIAL] [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL]

\P 28 (2	2003).	Second, the Commission has con	firmed that parties [BEGIN CO	NFIDENTIAL
			[END CONFIDENTIAL]	
	В.	IBEGIN CONFIDENTIALI		IEND

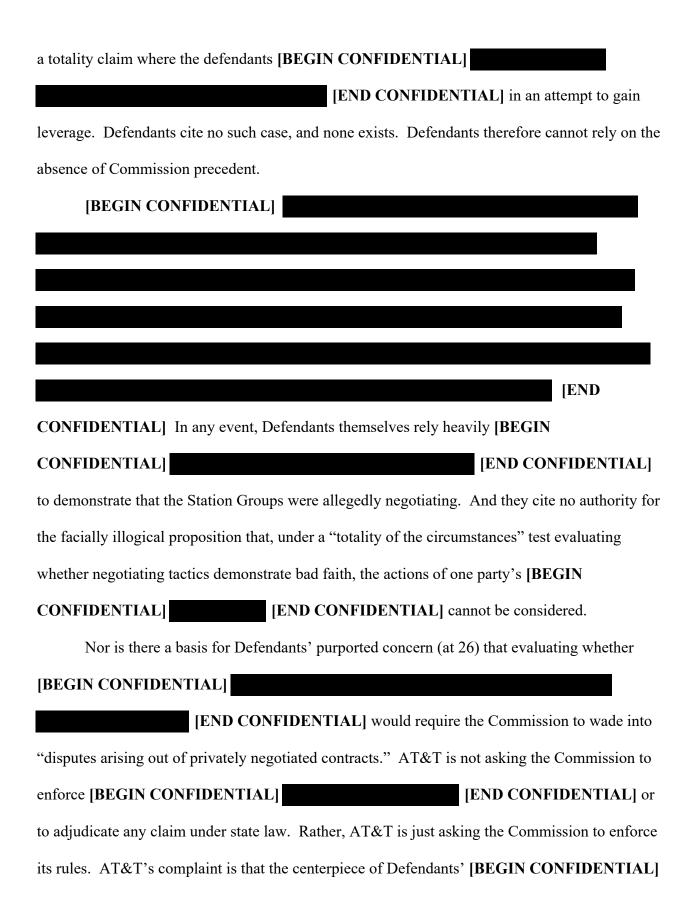
B. [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] Other Factors Are Within the Scope of the Totality-of-the-Circumstances Test

Defendants minimize their misconduct and refer (at 24) to AT&T's claim as "commonplace" and inviting "a back door inquiry [by the Commission] into . . . substantive terms." That characterization makes no sense. There are no substantive terms into which the Commission could inquire, through a back door or otherwise, because Defendants refused to discuss them.

Contrary to Defendants' characterization, AT&T's claim is that [BEGIN

CONFIDENTIAL] [END

CONFIDENTIAL] Defendants correctly note (at 25 n.105) that the Commission has found a good-faith violation under the totality-of-the-circumstances test on only one prior occasion. But that is of no consequence. There is no indication the Commission has had the occasion to review



END

CONFIDENTIAL] which is an act of bad-faith negotiating, and that Defendants therefore violated the Commission's good-faith rules.

Similarly, Defendants assert (at 27) that [BEGIN HIGHLY CONFIDENTIAL]

END

HIGHLY CONFIDENTIAL] cannot be considered because Sinclair is not a party.²⁰ But AT&T is again not currently seeking any relief with respect to Sinclair. Rather, based on

[BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL] these facts

are relevant under the totality-of-the-circumstances test. In particular, Defendants seek (at 25) to portray themselves as "nine small station groups," such that the Commission should not "intervene" against them and in AT&T's favor. That portrayal is inaccurate given Sinclair's interests.²¹

In sum, in evaluating AT&T's totality-of-the-circumstances claim, the Commission can and should consider *all* the relevant information including the facts giving rise to AT&T's *per se*

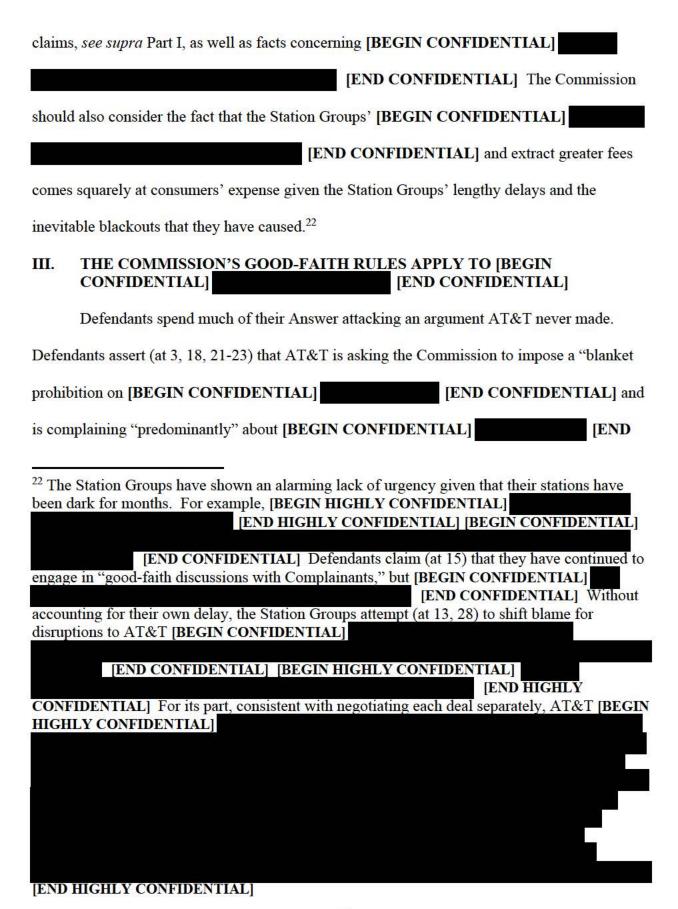
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HIGHLY CONFIDENTIAL] Defendants do not deny any of these allegations on factual grounds. *See* Answer at 32-33, 36, ¶¶ 23-26, 43.

²¹ [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL]

Defendants erroneously claim (at 27) that there is no "basis whatsoever" for AT&T's claims concerning Sinclair's apparent control over Defendants. Those claims are based on (i) public statements on the Station Groups' websites for their stations, Compl. ¶¶ 23-24 (citing references to Sinclair and an example directly stating the station is "owned and operated by Sinclair"); (ii) Sinclair's public references to the stations as "our stations" in Securities and Exchange Commission filings, *id.* ¶ 25; [BEGIN HIGHLY CONFIDENTIAL]



24

CONFIDENTIAL] the Commission has said are permissible. Not so. AT&T does not allege that [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] alone establish liability on any issue.

Rather, AT&T seeks relief under the Commission's explicit rules, which apply to broadcasters whether they are negotiating individually [BEGIN CONFIDENTIAL]

[END CONFIDENTIAL] Thus, whether they are negotiating individually [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] broadcasters cannot refuse to negotiate, refuse to respond to proposals, or unreasonably delay their responses. See 47 C.F.R. § 76.65(b). There is no [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] [END CONFIDENTIAL] exception to any of those rules.

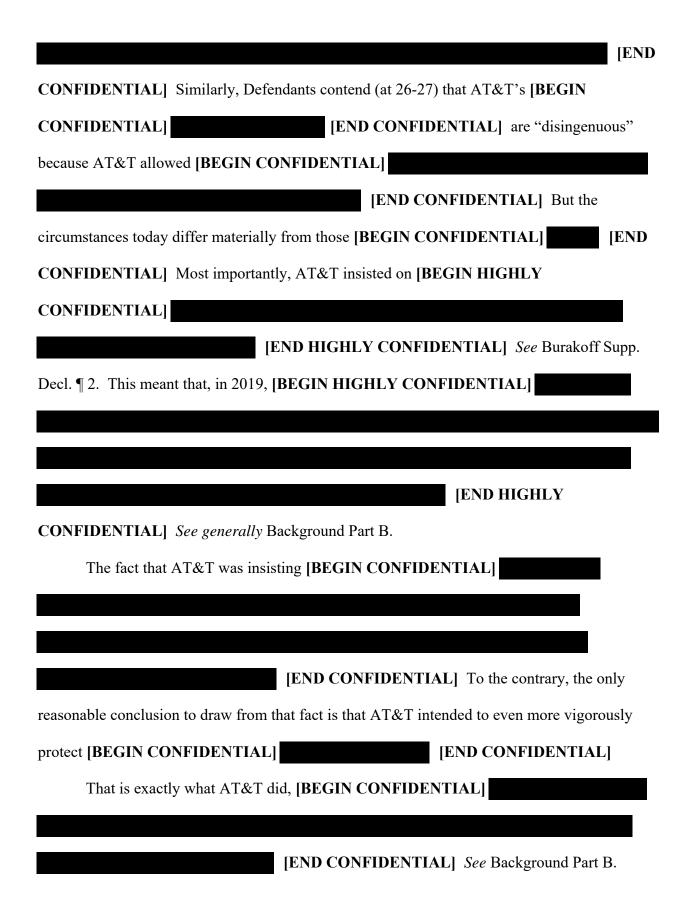
CONFIDENTIAL] [END CONFIDENTIAL] can also run afoul of the totality test if they engage in "outrageous" misconduct. Good-Faith Order ¶ 40. There is no [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] exception to the totality rules either. Thus, regardless of whether stations can negotiate [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] they cannot do so in a manner that relies on violating or interfering with a party's contractual [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] [END CONFIDENTIAL] or any other bad-faith negotiating tactics. See supra p. 21 (citing Commission authority).

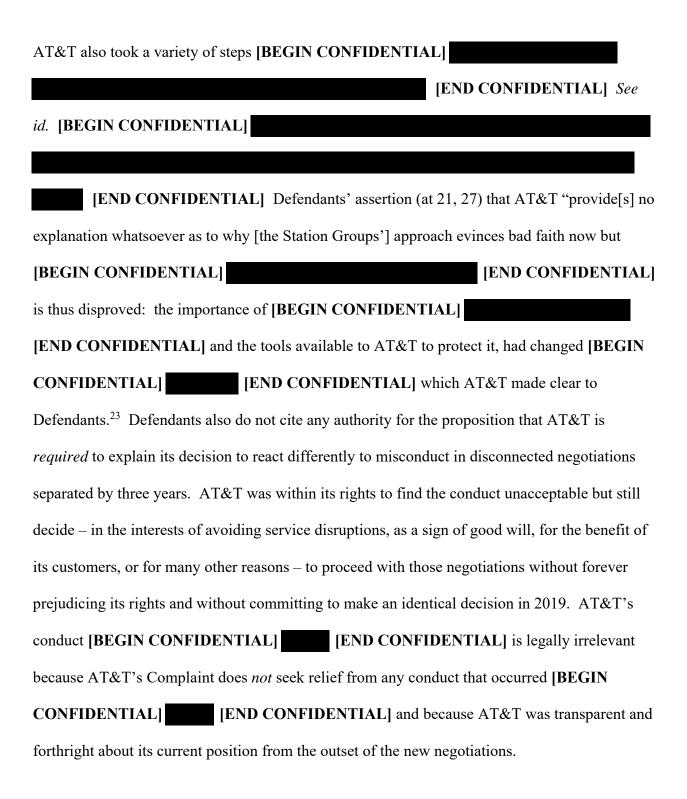
Despite acknowledging that the good-faith rules apply [BEGIN CONFIDENTIAL]

[END CONFIDENTIAL] Defendants contend (at 1920) that it would be a "direct assault on permissible [BEGIN CONFIDENTIAL]

[END CONFIDENTIAL] to sanction Defendants for failing to respond to

proposals and failing to negotiate. Defendants appear to suggest that, so long at least one station [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] Defendants can indefinitely refuse to negotiate their own deals even as retransmission consent agreements expire and blackouts stretch on, and even if, as is the case here, the limited negotiations that are happening are not advancing their own deals. See supra Part I.A (explaining lack of actual negotiations [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] That proposition cannot be reconciled with the plain text of the good-faith rules, which require broadcasters to actually negotiate, see 47 C.F.R. § 76.65(b)(1)(i), or with Commission guidance confirming that negotiators must act with the intent of reaching a deal, see Good-Faith Order ¶ 40. A broadcaster cannot satisfy its duty [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] while everyone else [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] refuses to do so. In this regard, Defendants are correct (at 19) that AT&T is concerned with "how" the Station Groups are [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] negotiating (or, more accurately, [BEGIN CONFIDENTIAL] END **CONFIDENTIAL**] Where, as here, the Station Groups are violating numerous rules and contracts under the guise of purported [BEGIN CONFIDENTIAL] **CONFIDENTIAL**] a good-faith Complaint is warranted. IV. THE [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] DO NOT EXCUSE THE STATION GROUPS' BAD FAITH IN 2019 Throughout the Answer, Defendants attempt to excuse their misconduct by citing the parties' [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] They contend (at 19-21) that AT&T's per se claims fail because [BEGIN CONFIDENTIAL]





²³ Defendants' contention that AT&T found Defendants' prior conduct "perfectly acceptable," Answer at 27, also misstates the relevant history between the parties. Indeed, Defendants note (at 8) that [BEGIN CONFIDENTIAL]
[END CONFIDENTIAL]

Further, any purported reliance based on AT&T's conduct in 2019 is contradicted by overwhelming record evidence. See Background Part B. The fact that AT&T agreed to [BEGIN] CONFIDENTIAL END CONFIDENTIAL] does not mean that AT&T "affirmatively consented to Defendants' [BEGIN [END CONFIDENTIAL] Answer at 10, particularly CONFIDENTIAL since they were [BEGIN CONFIDENTIAL] END CONFIDENTIAL] To the contrary, AT&T [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] See Background Part B. Nor could [BEGIN **CONFIDENTIAL**] plausibly be construed as a waiver even without that [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] which was reiterated with unmistakable clarity both before and after [BEGIN CONFIDENTIAL] [END CONFIDENTIAL]²⁴ In ²⁴ The other two instances of AT&T's 2019 conduct Defendants cite (at 16, 20) do nothing to show that AT&T was willing to tolerate [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL] is entirely consistent with AT&T's approach [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL] are all part of the [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]

applying its good-faith negotiation rules, the Commission looks to "established precedent, particularly in the field of labor law." *Good-Faith Order* ¶ 6. "[N]ational labor policy casts a wary eye on claims of waiver of statutorily protected rights." *Gannett Rochester Newspapers, a Div. of Gannett Co. v. NLRB*, 988 F.2d 198, 203 (D.C. Cir. 1993) (citation omitted). Thus, any of AT&T's rights under the good-faith rules "can be waived only if [AT&T's] waiver is 'clear and unmistakable.'" *Id.* (citation omitted); *see also Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 79-80 (1998) (holding that waiver of a statutorily protected right must be clear and unmistakable). AT&T clearly and unmistakably [BEGIN CONFIDENTIAL]

END

CONFIDENTIAL] See Wilkes-Barre Hosp. Co. v. NLRB, 857 F.3d 364, 378-79 (D.C. Cir. 2017) (rejecting attempt by employer to claim waiver based on "failure to bring an unfair labor practice charge" in prior negotiations; "the Union's one-time failure to challenge . . . does not estop subsequent assertion of that right"; noting that the Supreme Court has held that "two instances of a union's silence did not establish a pattern of decisions clear enough to convert the union's silence into binding waiver") (citations omitted).

DEFENDANTS' AFFIRMATIVE DEFENSES SHOULD BE DISMISSED

 Defendants' first affirmative defense – failure to state a claim – should be dismissed for the reasons set out above and in the Complaint. The record evidence proves that

Station Group and thus present no risk of [BEGIN CONFIDENTIAL]

[END CONFIDENTIAL] See [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL] Similarly, the fact that [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL]

Defendants failed to negotiate in good faith under 47 C.F.R. § 76.65(b)(i), (iii), and (v), as well as 47 C.F.R. § 76.65(b)(2).

2. Defendants' second affirmative defense – that AT&T's claims are time-barred – is frivolous.²⁵ The Complaint alleges claims based on misconduct that occurred in 2019, and AT&T has one year from the date of that misconduct to file its claims. See 47 C.F.R. § 76.65(e)(2) (one-year period runs from date defendant "engages in retransmission consent negotiations . . . that the complainant alleges to violate one or more of the [good-faith] rules"). Defendants' contrary assertion (at 44-46) that AT&T's time to seek relief began to run [BEGIN] **CONFIDENTIAL**] **[END CONFIDENTIAL**] has no basis in fact or law. As Defendants themselves recognize (at 45), Commission precedent holds that disputes arising from renewal negotiations trigger their own one-year period, running from the date of any misconduct in the latest round of negotiations.²⁶ To get around this, Defendants pretend (at 45) that AT&T is seeking relief from misconduct that occurred [BEGIN CONFIDENTIAL] **CONFIDENTIAL**] But the Complaint contains no allegations about misconduct [BEGIN CONFIDENTIAL [END CONFIDENTIAL] and there is no basis to treat the 2019 negotiations as part of the [BEGIN CONFIDENTIAL] END **CONFIDENTIAL**] They are distinct, as is the misconduct alleged, thereby triggering a distinct limitations period. AT&T's claims are timely and should be considered on the merits.

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²⁵ Commission rules require that "every effort should be made to narrow the issues" in an answer. 47 C.F.R. § 76.7(b)(2)(iii).

²⁶ See Order on Reconsideration, *Implementation of the Satellite Home Viewer Improvement Act of 1999*, 16 FCC Rcd 15599, ¶ 10 (2001) ("[I]f a broadcaster and MVPD negotiate and execute a five-year retransmission consent agreement in Year 1 and subsequently commence negotiations to renew or extend such consent in Year 4, any alleged violations of the good faith requirement stemming from such Year 4 negotiations are subject to complaint for a one-year period.").

3. Defendants' third affirmative defense – equitable estoppel – should be dismissed for reasons stated in Part IV, supra, assuming that equitable estoppel could even preclude AT&T from making claims asserted in the Complaint. As an initial matter, by its terms, this Affirmative Defense challenges only AT&T's ability to argue that using a [BEGIN] CONFIDENTIAL [END CONFIDENTIAL] in and of itself violates the goodfaith obligations, see Answer at 46, and the examples of prior conduct on which Defendants rely show only that [BEGIN CONFIDENTIAL] **END CONFIDENTIAL**] see, e.g., id. at 16. AT&T's Complaint does not, however, rely on [BEGIN] [END CONFIDENTIAL] in and of itself, as a **CONFIDENTIAL** basis for finding that Defendants acted in bad faith. Thus, even if AT&T is estopped from arguing that Defendants cannot [BEGIN CONFIDENTIAL] **IEND CONFIDENTIAL**] AT&T is not estopped from arguing [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] or otherwise violate the good-faith rules, nor is AT&T estopped from seeking relief from Defendants' continued use of a [BEGIN CONFIDENTIAL] [END **CONFIDENTIAL**] who has engaged in bad faith conduct.

In any event, Defendants' estoppel argument fails. Defendants argue that they should be permitted in 2019 to rely upon AT&T's conduct during [BEGIN CONFIDENTIAL]

[END CONFIDENTIAL] and that AT&T should not be permitted to change its negotiation position this time around. But equitable estoppel has no application based on [BEGIN CONFIDENTIAL]

[END CONFIDENTIAL] [END CONFIDENTIAL] over a completely separate transaction. See Wilkes-Barre Hosp., 857 F.3d at 378-79; see also

Memorandum Opinion and Order, AirTouch Cellular v. Pacific Bell, 16 FCC Rcd 13502, ¶ 16

(2001) (questioning whether equitable defenses are available and rejecting estoppel and waiver defenses where defendant "failed to offer any evidence that [complainant] expressly waived its right" and where complaint "states repeatedly that it did *not* waive any right").

Moreover, equitable estoppel is not an available defense to Defendants because they lack

any justification for relying on AT&T's position [BEGIN CONFIDENTIAL]

[END CONFIDENTIAL] as shown in the one case they cite. The doctrine of equitable estoppel "has been used to prevent a party from taking a position that is inconsistent with earlier conduct when he was aware that his adversary would rely upon the prior inconsistent conduct," and, "[t]o prove a claim of equitable estoppel, the aggrieved party must show that he justifiably relied upon the conduct of the party sought to be estopped." Memorandum Opinion and Order, Communique Telecommunications, Inc. d/b/a Logicall Application for Review of the Declaratory Ruling and Order Issued by the Common Carrier Bureau, 14 FCC Rcd 13635, ¶ 29 (1999) (emphases added). AT&T commenced negotiations by explicitly and repeatedly informing Defendants that AT&T [BEGIN CONFIDENTIAL]

END

CONFIDENTIAL] As discussed, AT&T consistently applied its stated position and went so far as to send cease-and-desist letters that have now culminated in actual litigation to enforce AT&T's rights. To the extent Defendants relied on [BEGIN CONFIDENTIAL]

[END CONFIDENTIAL] rather than these explicit statements in 2019, doing so was unjustified.²⁷ Nor did AT&T have any way to be "aware" that Defendants would ignore what

[END CONFIDENTIAL] – is contradicted

by record evidence. [BEGIN CONFIDENTIAL]

²⁷ Defendants' only concrete example of supposed "reliance" – the claim (at 46-47) that they would have been less likely [BEGIN CONFIDENTIAL]

AT&T said and purportedly rely instead on [BEGIN CONFIDENTIAL]
[END CONFIDENTIAL] under entirely different circumstances, including the absence of
[BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY
CONFIDENTIAL] for each station group [BEGIN CONFIDENTIAL] 1
[END CONFIDENTIAL]
Further, Defendants expressly disclaimed that they were in fact relying on AT&T's
position to formulate their own strategy. When AT&T informed [BEGIN CONFIDENTIAL]
[END CONFIDENTIAL] Defendants' claim (at 46) that negotiations
were structured around AT&T's policy cannot be squared with [BEGIN CONFIDENTIAL]
[END CONFIDENTIAL]
Defendants thus confirmed that they acted as they did for their own reasons and that any injury
they have suffered has been self-inflicted and is not "a result of Complainants' about face."
Answer at 47. For this reason, too, the defense should be dismissed.
CONCLUSION
Based on the foregoing, the Commission should deny the Station Groups' affirmative
defenses, find that the Station Groups failed to negotiate in good faith, and award the remedies
sought in the Complaint.
END CONFIDENTIAL]

Respectfully submitted,

DIRECTV, LLC AT&T SERVICES, INC.

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Counsel for DIRECTV, LLC and AT&T Services, Inc.

August 23, 2019

VERIFICATION

- I, Sean A. Lev, do hereby declare and state under penalty of perjury as follows:
- 1. I am a Partner at Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., and Counsel for DIRECTV, LLC and AT&T Services, Inc. My business address is 1615 M Street, N.W., Suite 400, Washington, D.C. 20036.
- 2. I have read the foregoing Reply. To the best of my personal knowledge, information, and belief formed after reasonable inquiry, the statements made in this Reply (other than those of which official notice can be taken) are well grounded in fact and warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law. This Reply is not interposed for any improper purpose.

Sean A. Lev

August 23, 2019

SUPPLEMENTAL DECLARATION OF LINDA BURAKOFF

I, Linda Burakoff, am over the age of 18. I am a resident of the state of California. I have personal knowledge of the facts herein, and, if called as a witness, could competently testify thereto.

- I am Vice President, Content & Programming for AT&T Mobility & Entertainment
 Group. In that role, I routinely oversee retransmission negotiations between various
 AT&T entities, including AT&T Services, Inc. and DIRECTV, LLC (collectively,
 "AT&T"), and broadcast stations. In particular, I have been personally involved on
 behalf of AT&T in the negotiations that are the subject of the foregoing Verified
 Complaint.
- 2. I have reviewed the Reply in Support of AT&T's Complaint for Defendants' Failure to Negotiate in Good Faith ("Reply"). Based on my personal knowledge, each statement in the Reply followed by a reference to this declaration is true and correct. Moreover, based on information made known to me pursuant to my duties, the remainder of the Factual Background is true and correct, as well.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on August 23, 2019, in California.

Linda Burakoff

CERTIFICATE OF SERVICE

Ihereby certify that, on August 23, 2019, I caused a copy of two versions of the foregoing Reply-(1) the fully redacted Public Version as filed with the Commission, and (2) a version redacted to remove certain information for which AT&T has requested Commission approval to limit disclosure to the Station Groups' attorneys not participating in negotiations with AT&T (and marked "CONFIDENTIAL INFORMATION -Not for Public Inspection")- to be served upon the following entities:

Deerfield Media, Inc. Deerfield Media (Port Arthur) Licensee, LLC Deerfield Media (Cincinnati) Licensee, LLC Deerfield Media (Mobile) Licensee, LLC Deerfield Media (Rochester) Licensee, LLC Deerfield Media (San Antonio) Licensee, LLC GoCom Media of Illinois, LLC Howard Stirk Holdings, LLC HSH Flint (WEYI) Licensee, LLC HSH Myrtle Beach (WWMB) Licensee, LLC KMTR Television, LLC Mercury Broadcasting Company, Inc. MPS Media of Tennessee Licensee, LLC MPS Media of Gainesville Licensee, LLC MPS Media of Tallahassee Licensee, LLC MPS Media of Scranton Licensee, LLC Nashville License Holdings, LLC Second Generation of Iowa, LTD Waitt Broadcasting, Inc.

via overnight delivery and via electronic mail (as designated) on those on the attached list, and/or upon the named defendants by hand delivery to their registered agents for service of process.

Matthew M. Duffy